

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DONALD AGEE, JR. et al.,

Plaintiffs,

v.

JOCELYN BENSON, et al.,

Defendants.

Case No. 1:22-CV-00272-PLM-RMK-JTN

FINAL PRETRIAL ORDER

Pursuant to the Court's Case Management Order of August 31, 2023 ([ECF No. 82, PageID.2045](#)), counsel for Plaintiffs and counsel for Defendants, Michigan Independent Citizens Redistricting Commission, Douglas Clark, Juanita Curry, Anthony Eid, Rhonda Lange, Steven Terry Lett, Brittnei Kellom, Cynthia Orton, M.C. Rothhorn, Rebecca Szetela, Janice Vallette, Erin Wagner, Richard Weiss, and Dustin Witjes, each in his or her official capacity as a Commissioner of the Commission (collectively, the "Commission"), met and conferred to prepare the foregoing pretrial order.

A final pretrial conference was held on October 5, 2023. Appearing for the parties:

For Plaintiffs: John J. Bursch, Amia Banks, James J. Fleming, Michael J. Pattwell, Jennifer K. Green, and Ronald A. King

For Commission Defendants: Katherine McKnight, Patrick T. Lewis, Nathan J. Fink, E. Mark Braden

For Defendant Benson: Erik Grill

1. Exhibits. The following Exhibits will be offered by the Plaintiffs and Defendants.

(List separately for each party all exhibits, including demonstrative evidence and summaries of other evidence, by name and number. Plaintiffs shall use numbers; defendants shall use letters. Indicate with respect to each exhibit whether and for what reason its admissibility is challenged. Exhibits expected to be used solely for impeachment purposes need not be numbered or listed until identified at trial. Failure to list an exhibit required to be listed

by this order will result, except upon a showing of good cause, in a determination of non-admissibility at trial. Objections not contained in the Pretrial Order, other than objections under Evidence Rule 402 or 403, shall be deemed waived except for good cause shown. See Fed. R. Civ. P. 26(a)(3)(B).)

Plaintiffs' Exhibit List is attached as Exhibit 1A, is incorporated herein by reference, and reports Plaintiffs' exhibits along with the Commission's objections thereto.

The Commission's Exhibit List is attached as Exhibit 1B, is incorporated herein by reference, and reports the Commission's exhibits. Plaintiffs do not object to any of the Commission's exhibits.

2. Uncontroverted Facts. The parties have agreed that the following may be accepted as established facts:

(State in detail all uncontroverted facts.)

The parties submitted stipulated facts on September 29, 2023 (ECF No. 87).

3. Controverted Facts and Unresolved Issues. The factual issues remaining to be determined and issues of law for the Court's determination are:

(Set out each issue which is genuinely controverted, including issues on the merits and other matters which should be drawn to the Court's attention.)

The parties set out the following controverted facts and unresolved issues:

- a. As to each Count of the First Amended Complaint (ECF No. 8) and as to all remaining Plaintiffs:

- i. Whether the Plaintiff has shown an injury-in-fact;
- ii. Whether the Plaintiff has shown that such injury-in-fact can be redressed by the creation of a Section 2 remedial district.

- b. As to Count I of the First Amended Complaint (ECF No. 8) (Violation of Section 2 of the Voting Rights Act, House VRA Plaintiffs), to the extent summary judgment

was not granted to the Commission on the Count in the Court's order of August 29, 2023 ([ECF No. 81](#)):

For each of Michigan House Districts 1, 7, 10, 12, and 14:

- iii. Whether each of the *Gingles* preconditions are satisfied;
- iv. Whether, under the totality of the circumstances, members of the identified racial group have less opportunity than do other members of the electorate to elect a candidate of their choice.

c. As to Count II of the First Amended Complaint (Violation of Section 2 of the Voting Rights Act, Senate VRA Plaintiffs), to the extent summary judgment was not granted to the Commission on the Count in the Court's order of August 29, 2023 ([ECF No. 81](#)):

For each of Michigan Senate Districts 1, 3, 6, and 8:

- i. Whether each of the *Gingles* preconditions are satisfied;
- ii. Whether, under the totality of the circumstances, members of the identified racial group have less opportunity than do other members of the electorate to elect a candidate of their choice.

d. As to Count III of the First Amended Complaint (Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution – Racial Gerrymandering, House Equal Protection Plaintiffs), to the extent summary judgment was not granted to the Commission on the Count in the Court's order of August 29, 2023 ([ECF No. 81](#)):

For each of Michigan House Districts 1, 7, 8, 10, 11, 12, and 14:

- i. Whether the Commission used race as the predominant criterion to configure the district; and
- ii. If so, whether the Commission's use of race satisfies strict scrutiny, i.e., was narrowly tailored for compliance with the Voting Rights Act.

e. With respect to Count IV of the First Amended Complaint (Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution –

Racial Gerrymandering, Senate Equal Protection Plaintiffs), to the extent summary judgment was not granted to the Commission on the Count in the Court's order of August 29, 2023 (ECF No. 81):

For each of Michigan Senate Districts 1, 3, 6, 8, 10, and 11:

- i. Whether the Commission used race as the predominant criterion to configure the district; and
- ii. If so, whether the Commission's use of race satisfies strict scrutiny, i.e., was narrowly tailored for compliance with the Voting Rights Act.

4. Witnesses:

- A. Non-expert witnesses to be called by the plaintiffs and defendants, except those who may be called for impeachment purposes only, are:

(List names, addresses, and telephone numbers of all non-experts who will testify. Indicate whether they are expected to testify in person, by deposition videotape, or by reading of their deposition transcript. Indicate all objections to the anticipated testimony of each non-expert witness. For each witness listed, indicate whether the witness **will be** called or merely **may be** called to testify.)

Plaintiffs

Will Call

Witness Name	Address/Phone	In-Person or Deposition
Rhonda Lange	c/o Commission counsel	In-Person
Rebecca A. Szetela	P.O. Box 31318, Lansing, MI 48909, (517) 335-3333	In-Person
LaMar Lemmons III	c/o Plaintiffs' counsel	In-Person
Virgil K. Smith	c/o Plaintiffs' counsel	In-Person

May Call

Witness Name	Address/Phone	In-Person or Deposition
Jocelyn Benson	c/o counsel for Benson	In-Person
M.C. Rothhorn	c/o Commission counsel	In-Person
Erin Wagner	c/o Commission counsel	In-Person
Dustin Witjes	c/o Commission counsel	In-Person
Each of the remaining named Plaintiffs	c/o Plaintiffs' counsel	In-Person
Bruce L. Adelson	11808 Becket St., Potomac, MD 20854; (301) 762-5272	In-Person
Julianne V. Pastula, Esq.	2 Woodward Ave., Ste. 500, Detroit, MI 48226-5431, (313) 237-3137	In-Person
Suann Hammersmith	13052 Crockett Hwy., Blissfield, MI 49228, (517) 403-1346	In-Person
Brittini Kellom	c/o Commission counsel	In-Person
Anthony Eid	c/o Commission counsel	In-Person
Juanita Curry	c/o Commission counsel	In-Person
Steven Terry Lett	c/o Commission counsel	In-Person
Kim Brace	c/o Commission counsel	In-Person
The Hon. Stephen Markman	c/o Hillsdale College 33 E College St. Hillsdale, MI 49242	In-Person

CommissionWill Call

Witness Name	Address/Phone	In-Person or Deposition
Dr. Lisa Handley	c/o Commission counsel	In-Person

Witness Name	Address/Phone	In-Person or Deposition
Bruce Adelson	c/o Commission counsel	In-Person
Commissioner Anthony Eid	c/o Commission counsel	In-Person

May Call

Witness Name	Address/Phone	In-Person or Deposition
Commissioner Steve Lett	c/o Commission counsel	In-Person
Kent Stigall	c/o Commission counsel	In-Person
Any other witness identified by other party	c/o Commission counsel	In-Person
Any other party to this action		In-Person

- B. Expert witnesses to be called by the plaintiffs and defendants, except those who may be called for impeachment purposes only, are:

(List names, addresses, and telephone numbers of all experts who will testify, providing a brief summary of their qualifications and a statement of the scientific or medical field(s) in which they are offered as experts. Indicate whether they will testify in person, by deposition videotape, or by reading of their deposition transcript. Indicate all objections to the qualifications or anticipated testimony of each expert witness.)

It is understood that, except upon a showing of good cause, no witness whose name and address does not appear in the lists required by subsections (a) and (b) will be permitted to testify for any purpose, except impeachment, if the opposing party objects. Any objection to the use of a deposition under Fed. R. Civ. P. 32(a) not reflected in the Pretrial Order shall be deemed waived, except for good cause shown.

PlaintiffsWill Call

Expert Witness Name	Address/Phone Number	In-Person or Deposition	Summary of Qualifications	Field of Expertise
Sean P. Trende	c/o Plaintiffs' counsel	In-Person	<ul style="list-style-type: none"> - Senior Elections Analyst – Real Clear Politics. - Authored voluminous scholarship on elections/voting patterns. - Provided expert reports and expert testimony on numerous occasions over the previous 4 years on elections/gerrymandering. - Appointed Voting Rights Act expert by Arizona Independent Redistricting Commission (2020). - Appointed Special Master by the Supreme Court of Virginia to redraw district maps for Virginia House of Delegates, Senate of Virginia, and 	<ul style="list-style-type: none"> - Racial Gerrymandering - Voting Rights Act Compliance - Redistricting

Expert Witness Name	Address/Phone Number	In-Person or Deposition	Summary of Qualifications	Field of Expertise
			<p>Congressional delegation.</p> <ul style="list-style-type: none"> - Appointed redistricting expert by the Supreme Court of Belize. - B.A., History and Political Science, <i>with distinction</i>, Yale University. - M.A., Duke University, Political Science, <i>cum laude</i>. - J.D., Duke University School of Law, <i>cum laude</i>. - M.A.S. (Master of Applied Statistics), The Ohio State University. - Current Ph.D. candidate, Political Science, The Ohio State University. 	
Dr. Brad Lockerbie	c/o Plaintiffs' counsel	In-Person	<ul style="list-style-type: none"> - Professor of Political Science – East Carolina University. - Authored over 30 peer-reviewed articles on elections and public opinion. - Authored several book chapters examining race 	<ul style="list-style-type: none"> - Racial discrimination and its current effect on voting patterns/the political process. - Racial polarization voting and patterns. - Analyzation of the factors discussed in the

Expert Witness Name	Address/Phone Number	In-Person or Deposition	Summary of Qualifications	Field of Expertise
			relating to voting behavior. - Provided expert testimony at trial and/or deposition on multiple occasions over the past 4 years. - B.A., Political Science, University of Georgia. - Ph.D., Political Science (specializing in American electoral behavior), University of Iowa.	Senate Report that accompanied the 1982 Voting Rights Act Amendments, S.Rep. No. 97-417, at 28-29 (1982)
Dr. Lisa Handley	c/o Commission counsel	In-Person	- Retained by the Michigan Independent Citizens Redistricting Commission to analyze racial voting patterns, minority opportunity districts, and partisan fairness.	- Voting Rights Act compliance - Redistricting

Plaintiffs submits this list based on information reasonably known to or obtained by Plaintiffs as of the date below. Plaintiffs' investigation and discovery is ongoing, and Plaintiffs reserve the right to modify, amend, add to, or otherwise supplement this list as permitted by the Federal Rules of Civil Procedure, the Local Rules, or any orders of this

Court, either through express supplements to this list or through responses to formal discovery, as additional information becomes available during the course of this lawsuit or in the event that one or more witnesses becomes unavailable and others must be substituted.

Commission

Will Call

1. Dr. Lisa Handley – c/o Commission counsel – for in-person testimony.

Summary of Qualifications: Dr. Handley is the President of Frontier International Consulting. Dr. Handley holds a Ph.D. in Political Science from the George Washington University. She has over thirty years of experience in the areas of redistricting and voting rights, both as a practitioner and an academician, and is recognized nationally and internationally as an expert on these subjects. Dr. Handley has advised numerous clients on redistricting and has served as an expert in dozens of redistricting and voting rights court cases. Her clients have included the U.S. Department of Justice, civil rights organizations, independent redistricting commissions and scores of state and local jurisdictions.

Statement of Scientific Fields In Which Witness Is Offered As Expert: Political science; racially polarized voting; racial voting patterns; compliance with the Voting Rights Act.

2. Dr. Maxwell Palmer – c/o Commission counsel – for in-person testimony.

Summary of Qualifications: Dr. Maxwell Palmer is Associate Professor of Political Science at Boston University in Boston, Massachusetts, and Director of Advanced Programs in the Department of Political Science. Dr. Palmer has studied, published, and testified as an expert witness in redistricting matters. He holds an A.M. and Ph.D. in Political Science from Harvard University and a B.A. from Bowdoin College. His work includes, among other things, the use of statistical tools to study voting patterns and the use of computer simulation algorithms to study problems in redistricting.

Statement of Scientific Fields In Which Witness Is Offered As Expert: Political science; redistricting; racially polarized voting; racial voting patterns; compliance with the Voting Rights Act.

3. Dr. Jonathan Rodden – c/o Commission counsel – for in-person testimony.

Summary of Qualifications: Dr. Jonathan Rodden is Professor of Political Science at Stanford University in Palo Alto, California, and Director of the Spatial Social Science Lab at that university. Dr. Rodden has studied, published, and has testified as an expert witness in redistricting matters. He holds a Ph.D. in Political Science from Yale University and a B.A. from the University of Michigan. His work includes, among other things, analysis of the geographic distribution of political preferences and the use of tools from mathematics and computer science to study problems in redistricting.

Statement of Scientific Fields in Which Witness Is Offered As Expert: Political science; geospatial analysis; redistricting; racially polarized voting; racial voting patterns; compliance with the Voting Rights Act.

The Commission submits this list based upon information reasonably known to or obtained by the Commission as of the date below. The Commission's investigation and discovery is ongoing and, accordingly, the Commission reserves the right to modify, amend, add to, or otherwise supplement this list as permitted by the Federal Rules of Civil Procedure, the Local Rules, or any orders of this Court, either through express supplements to this list or through responses to formal discovery, as additional information becomes available during the course of this lawsuit or in the event that one or more witnesses becomes unavailable and others must be substituted.

5. Depositions and Other Discovery Documents:

All depositions, answers to written interrogatories, and requests for admissions, or portions thereof, that are expected to be offered in evidence by the plaintiffs and the defendants are:

(Designate portions of depositions by page and line number. Designate answers to interrogatories and requests for admissions by answer or request number. Designation need not be made of portions that may be used, if at all, as impeachment of an adverse party. Indicate any objections to proposed deposition testimony, answers to interrogatories, and admissions.)

The Commission designates the following discovery responses that it expects to offer into evidence:

Each Plaintiff's answer to the Commission's Interrogatory No. 1 (as to address)

Each Plaintiff's answer to the Commission's Request for Admission No. 6

Each Plaintiff's answer to the Commission's Request for Admission No. 8

6. Length of Trial: Counsel estimate the trial will last approximately 6 full days, allocated as follows: 3 days for Plaintiffs' case; 3 days for Defendants' case.

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Respectfully submitted,

/s/ John J. Bursch

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ORDER

IT IS SO ORDERED.

Date: October 5, 2023

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge
On Behalf of the Three-Judge Panel